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In The

Supreme Court of the United States

October Term, 1997

BETH ANN FARAGHER,

Petitioner,

vs.

THE CITY OF BOCA RATON,
a political subdivision of the State of Florida,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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STATEMENT OF THE CASE

The Questions Presented in this case address the agency principles to which the Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) commended the lower courts in establishing employer liability for hostile-environment sexual harassment. This case presents the Court with issues of how to apply such common-law doctrines as agency and constructive notice to the statutory tort of sexual harassment.[1]

STATEMENT OF THE FACTS

Several of respondent's statements about the record require correction and/or clarification.

The "immediate disciplinary action against William Terry and David Silverman," Respondent's Brief, ("R. Br.") at 2, was not the swift, firm justice suggested by the tone of Respondent's Brief. Even the district court remarked on what it characterized as the "somewhat cavalier attitude toward the severity of Terry and Silverman's conduct . . . ," Petitioner's Appendix ("Pet. App.") at 81a,[2] displayed by Richard Bender, the City's director

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[1] Also encompassed within the Questions Presented are agency and notice principles that, upon remand, would effect the way in which the lower courts dispose of the state law claims.

[2] The respondent persists in an it's-not-so-bad assessment of Terry and Silverman's behavior toward petitioner and other women during the 1986-1990 period. *See* R. Br. at 10 & n.6. Not only did the district court find that Faragher's evidence met the test set out in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), App. at 86a-90a, but the initial panel of the court of appeals

of personnel and labor relations. Although Bender received Nancy Ewanchew's letter of complaint in April 1990, he did not interview Faragher, or any other female lifeguard, until June 18, 1990, acting only after the South Florida Chapter of the National Organization for Women had involved itself in the controversy, Pet. Br. at 7; Trial Testimony of June 22, 1994 at 160. In a conversation with Silverman, Bender sugarcoated even the modest penalty imposed as something the City simply had to do as a strategy to avoid a lawsuit, assuring Silverman that, "[y]ou all accept it and that will be that." Trial Testimony of June 23, 1994, at 26.

The remoteness of the beach from City Hall, mentioned by the courts below, Pet. App. at 81a, 86a, and seized upon by the respondent, R. Br. at 4, 21, is more illusory than real: less than 1.5 miles – approximately the distance from the Supreme Court to the Washington Monument. Lorraine Gardiner, the recreation superintendent from 1974 through January 1988, visited the headquarters on an average of every other month, and patrolled the beach in her car, sometimes getting out, two to three times a week. J.A. at 239. Sandra Dioli-Kumm, the recreation superintendent from March 1988 to May 1989,[3] visited the beach at least once a week. Trial Testimony of June 23, 1994, at 136-137.

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noted that it "might have been clear error for the District Court, having credited Faragher's testimony, to find otherwise." App. at 54a.

[3] Ewanchew, Faragher's co-plaintiff, met with Dioli-Kumm once to discuss a personnel evaluation, Trial Testimony of June 23, 1994, at 139-140, not "on several different occasions." R. Br. at 4, n.3.

It is clear from the testimony that the complaints to Lifeguard Captain Robert Gordon occurred prior to Ewanchew's 1990 letter. Faragher testified that she had complained to Captain Gordon prior to April 1990. Trial Testimony of June 22, 1994, at 199. Ewanchew, who resigned in the spring of 1989 and waited for a year after she left the City's employ to write to Bender, the personnel director, J.A. at 119-120, complained to Gordon repeatedly during the time that she worked for the City, J.A. at 115, 144-145, as well as personally witnessed both Faragher and Jamie Harrington, another lifeguard, complain to Gordon about Terry's and Silverman's behavior. J.A. at 117. Gordon also testified that he had received a complaint from Gail Nye, J.A. at 140, who worked at the beach from November 1987 through November 1988. Trial Testimony of June 23, 1994, at 112.

ARGUMENT

With growing recognition of the invidious way in which hostile-environment sexual harassment can be used to poison the workplace, this case presents the Court not merely with the issue of the scope of an employer's liability for supervisor misconduct, but also with the issue of what must an employer do to make its workplace truly accessible to all. Instead of requesting that the Court embrace the "strict liability" that it eschewed in *Meritor*, petitioner (and her *amici*) seek a common-sense approach grounded in traditional agency principles. Respondent, on the other hand, asks this Court to hold that employers ordinarily be immune from liability unless members of "higher management" have personal knowledge of the sexual harassment, an ill-

defined standard that would not encourage policies to eradicate sexual harassment, but rather policies to ensure that those officials remain blissfully ignorant of that abuse, lest they be held liable for it.

I. AN EMPLOYER, PURSUANT TO COMMON-LAW PRINCIPLES OF AGENCY, IS RESPONSIBLE FOR HOSTILE-ENVIRONMENT SEXUAL HARASSMENT COMMITTED BY SUPERVISORY EMPLOYEES WHO USE THEIR SUPERVISORY STATUS TO EFFECT THE HARASSMENT.

Section 219(2)(d) of the Restatement (Second) of Agency (1958) is not "strict liability" in camouflage, as suggested by respondent. *See, e.g.* R. Br. at 19-21. Rather, it is a recognition that a master traditionally has been subject to liability for the torts of his servant where

> the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, *or* he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency (1958), § 219(2)(d) (emphasis added). Respondent proposes an interpretation of this section that renders superfluous the second clause[4] by limiting a principal's liability under the second clause to instances of apparent authority, already encompassed in the first clause, e.g., that kind exhibited by scheming telegraph operators and thieving store managers. R. Br. at 27-31. This constricted interpretation

[4] "The second clause is simply a refinement of the 'apparent authority' doctrine articulated in the first clause. . . ." R. Br. at 31 n.24.

ignores the actual language of section 219(2)(d), effectively deleting the "or" and replacing it with an "and thus." Indeed, on this reading, the entire sub-section would be largely superfluous, since a principal's liability for *fraudulent* use of apparent authority is already set out in section 261 of the Restatement (Second) of Agency.[5] Not even the en banc court adopted this anti-literal reading of section 219(2)(d), agreeing rather that the City would be liable if Terry and Silverman were aided "in their harassment of Faragher by their agency relationship with the City." Pet. App. 64a n.14.

Under respondent's interpretation of Title VII, an employer could be immune from liability – indeed, Title VII would not be violated at all – if a supervisor were to fire a subordinate out of race, national origin or sex-based animus. A supervisor who abuses his supervisory position to intimidate a harassment victim is using and is aided by his supervisory powers in the same way as a racist foreman who uses his hiring-and-firing authority to keep African-Americans off his crew. While each form of behavior can yield similar results – keeping women out of traditionally male occupations such as lifeguarding, for example, and keeping African-Americans out of all white shops – respondent's attempt to recast agency principles flies in the face of the Court's recognition in *Meritor* that "the courts have consistently held employers liable for

[5] Section 261 provides as follows: "A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud."

the discriminatory discharges of employees by supervisory personnel, *whether or not the employer knew, should have known, or approved of the supervisor's actions.*" 477 U.S. at 70-71, (emphasis added) *citing Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (6th Cir. 1972).[6] Such liability clearly follows from the principles of section 219(d)(2) that if an employer gives a lower-level supervisor the authority to manage a workplace, and the supervisor, albeit through malfeasance, uses that power to harm the employees there, then the employer is liable for the damage that it has empowered the supervisor to wreak. *See, e.g., Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982).[7] Were one to accept respondent's reasoning, however, a foreman acting with clearly sexist motivation, ordinarily could fire a female employee without exposing the corporate employer to liability. Indeed, because there would be no Title VII liability, and the fired

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[6] *Anderson* imposed liability on an employer for a racially motivated discharge by "a person in authority at a lower level of management" despite the fact that "upper management" was "exemplary." 464 F.2d at 725.

[7] The *Henson* court stated:

> [T]he reason for this stern rule is readily apparent:
>
> > When [the employer gave] its [supervisory personnel] authority to fire employees, it also accepted responsibility to remedy any harm caused by [the supervisors'] unlawful exercise of that authority. The modern corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual action.
>
> 682 F.2d at 909 (quoting *Tidwell v. American Oil Co.*, 332 F. Supp. 424, 436 (D. Utah 1971) (citation omitted)).

worker could not even obtain injunctive relief to get back her job.

So long as the Terrys and Silvermans of the world opt for the relative subtlety of sexual harassment over an announced ban on women in the workplace, respondent's reasoning – which appears also to aspire to a negligence standard for even quid pro quo sexual harassment, R. Br. at 26, n.18 – would shield employers such as the City of Boca Raton from liability for empowering such supervisors to behave as they do. While no one would suggest that the City would have been immune from liability if Chief Terry and Captain Silverman, animated by misogyny, had recommended successfully against hiring Faragher, or initiated discipline that resulted in her being fired based on pretextual grounds, that is precisely the result of applying respondent's logic. Although such a failure to hire or such a dismissal would obviously be aided by Terry's agency relationship, respondent insists that such aid is legally irrelevant unless the agent furthers the principal's business. R. Br. at 25-26.

Considering the remedial purpose of Title VII, however, and the peculiar power that employers have to impose zero-tolerance sexual-harassment policies from the top down, the application of section 219(d)(2) that petitioner seeks is especially consistent with congressional policy to eliminate sexual harassment from the workplace. "[F]ew doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own," *American Soc. of M.E.'s v. Hydrolevel Corp.*, 456 U.S. 556, 567 (1982) (anti-trust case involving apparent authority), *quoting Gleason v. Seaboard Air Line R. Co.*, 278 U.S. 349, 356 (1929). The Court there

explained that a principal that had enabled its agents to engage in misconduct "should be encouraged to eliminate" the agent's misuse of that power. 456 U.S. at 574. Just as the Court in *ASME* applied agency principles that would encourage principals to eliminate anti-competitive practices by their agents, "especially those who use their positions . . . solely for their own benefit . . . ," here the Court should apply these principles in a way that would encourage employers to eliminate sexual harassment by its supervisory employees.[8]

Respondent urges alternatively that section 219(2)(d) should apply only where a supervisor "affirmatively capitalizes on his supervisory status." R. Br. at 33. Respondent acknowledges that even where a supervisor never makes any such overt threats, subordinates often (indeed, it insists, always) would have good reason to fear that resistance or complaint would lead to retaliation by the supervisor. R. Br. at 15, 20. On respondent's view, however, an employer violates Title VII only when a supervisor expressly warns a victim that he would or could fire her if she physically resists his groping – which essentially is quid pro quo harassment – but not when a

[8] Within the context of civil rights enforcement, likewise, the Court has recognized how efficacious the establishment of a pricetag for non-compliance can be. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975) ("It is the reasonably certain prospect of a backpay award that 'provide[s] the catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices. . . . ' ") The purpose of monetary relief under Title VII is to give managers an "incentive to take preventative measures to ward off discriminatory conduct by subordinates *before* it occurs." *Landgraf v. USI Film Products*, 511 U.S. 244, 283 n.35 (1994).

marginally more subtle supervisor molests a subordinate without so blatantly invoking the fear of dismissal that he well knows is intimidating his victim.[9] Neither Title VII, agency principles nor common sense supports such a gossamer distinction.[10]

Respondent, as did the en banc court, trivializes a literal application of § 219(d)(2) by suggesting that such a reading would collapse "aided in" into little more than "proximity" to impose liability upon an employer. R. Br. at 33-34, Pet. App. at 12a. Such hyperbole distorts petitioner's argument. Petitioner does not contend that the mere fact that a supervisor may work near a subordinate is sufficient to establish liability under section 219(d)(2).[11]

[9] *See, e.g., Eichenwald v. Krigel's, Inc.*, 908 F. Supp. 1531, 1566 (D. Kan. 1995) ("The plaintiffs were justifiably afraid to complain about Mr. Shine's conduct based upon his upper level management position with the defendants and his dominating, hostile and volatile personality.")

[10] *See Nichols v. Frank*, 42 F.3d 503, 512 (9th Cir. 1994) ("Implicit quid pro quo . . . is far more likely to take place than is the explicit variety. As time goes by and harassers learn that they can no longer victimize their prey at will, their actions become less overt. In Hollywood, for example, the casting couch has been replaced by more subtle techniques. Yet for the potential employee, the result is the same.")

[11] A supervisor, however, could be aided by his position if he used his authority to require the victim to be near him. *E.g. Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1440-41 (10th Cir. 1997) (supervisor ordered victim to accompany him to an isolated part of a mine where he harassed her), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) (No. 97-232); *Farris v. Board of County Comm'rs of Wyandotte County*, 924 F. Supp. 1041, 1047 (D. Kan. 1996) (supervisor directed subordinate to meet him at a bar where he allegedly exposed himself).

The gravamen of petitioner's argument is that a supervisor may be aided in his harassment by his control over the victim's employment and prospects, particularly her fear that he will use that power to retaliate if she resists or complains.[12]

Respondent does not argue that supervisors cannot exercise such sway over their subordinates, but rather that such a power differential is so commonplace that it must be disregarded[13] – lest every woman who suffers harassment at the hands of her immediate boss be able to impose liability upon her employer by complaining that her employer has given her supervisor power and that the supervisor has misused that power to her detriment. *Supra* n.7 and accompanying text. That equation – inherent power, multiplied by fear, equals actionable intimidation – is modified, however, by the requirement inherent in any plaintiff's case that a victim's perception be reasonable. It is not sufficient that the victim be afraid:

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[12] Of course, a supervisor could exploit his supervisory position in other ways. *E.g., Henry v. Gehl Corp.*, 867 F. Supp. 960, 966 (D. Kan. 1994) (supervisor directed victim to stand up in front of male co-workers and then made offensive comments about her anatomy); *Rauh v. Coyne*, 744 F. Supp. 1186, 1190 (D.D.C. 1990) (supervisor gained access to restricted area in which victim worked by using a key possessed only by supervisors).

[13] R. Br. at 15 ("[a] test that rests on the victim's fear of retaliation if she complains . . . will result in automatic liability in cases in which the harasser is a supervisor. . . . "); *see also id.* at 20 ("Because the relationship between a supervisor and a subordinate is by definition one in which the supervisor holds some job power over the subordinate, the inevitable result in these circumstances is that a victim always will have . . . the reasonable fear necessary to render an employer liable.")

rather, she must be *reasonably* in fear of retaliation. Just as the Court has required that only an "objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive . . . ," is actionable under Title VII, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), finders of fact can, and should, view the supervisor-victim dynamic within the totality of the circumstances and should disregard an employee's chimerical assessment of a supervisor's power.

It is respondent's fear of strict liability, not petitioner's fear of retaliation, that is fanciful. Respondent's argument assumes that employers are powerless to effectively reassure employees that they may with impunity resist or complain about sexual harassment. The very purpose of a sound anti-harassment policy – zero-tolerance, mandatory up-the-line reporting by all supervisors, and aggressively communicated assurances of non-retaliation – is to do precisely that. Employers, in fact, have been successful in demonstrating that their practices had dispelled any fear employees might have had about resisting or complaining about harassment. *See, e.g., Bouton v. BMW of North America, Inc.*, 29 F.3d 103 (3rd Cir. 1994). Petitioner urges a reading of section 219(2)(d) that provides incentive for employers to eradicate such well-founded fears on the part of harassment victims, such as those harbored in the instant case that "Bill Terry could do things . . . that I thought were completely wrong and get away with it, because the City – or the people at City Hall would just back him up or support him, and cover it and just let it be." J.A. at 189.[14]

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[14] Significantly, respondent nowhere denies that petitioner regarded a complaint against Chief Terry as both pointless and

Respondent asserts that there was no evidence that Terry and Silverman used their authority in harassing petitioner. R. Br. at 11-12, 19, 35 n.28. Faragher alleged and the district court found, however, that Chief Terry and Captain Silverman's supervisory position facilitated the harassment, which in turn was enhanced by the City's laxity in addressing sexual harassment. Pet'r. Br. at 22-23, 29-30; Pet. App. at 71a-79a, 83a. Faragher expressly testified that she felt that "if I did complain, there was probably a good possibility that I would lose my job," J.A. 187 – a perception that was especially reasonable under circumstances in which no one other than the personnel director testified to knowing anything about the City's 1986 sexual harassment policy.[15]

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dangerous, and nowhere suggests that the view shared by petitioner and Captain Gordon was unreasonable.

[15] Although petitioner's argument is grounded in Chief Terry and Captain Silverman's real authority over her, to argue as respondent does that "[t]he common-law agency concept of 'apparent authority' has no application to sexual harassment cases based on hostile work environment," R. Br. at 27, is to ignore the viewpoint of those upon whom a sexual harasser is most likely to prey – i.e., the ones he senses as being so powerless, and perceiving him as so powerful, that they will not complain.

II. RESPONDENT HAD KNOWLEDGE, BOTH ACTUAL AND CONSTRUCTIVE, OF TERRY AND SILVERMAN'S SEXUAL HARASSMENT OF PETITIONER.

A. Gordon's (and the City's) Actual Knowledge

Under section 272 of the Restatement (Second) of Agency (1958), an employer is charged with knowledge of information known to an employee who has a duty to report that information to other officials. Respondent seeks to supplant that doctrine with a rule requiring that notice be given to someone within "higher management." R. Br. at 5, 7, 12, 14, 42-44. However, *Young v. Bayer Corp.*, 123 F. 3d 672 (7th Cir. 1997), on which respondent relies, rejects the higher-management notion and suggests, sensibly, that the twin inquiries should be, "who has the authority to terminate the harassment of which the plaintiff is complaining and did the plaintiff complain to someone who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it." 123 F.3d at 675.

The inquiry prescribed in *Young* – whether the lifeguard captain to whom several women complained about sexual harassment had a duty to report the complaints up the ladder?[16] – comports with the traditional agency principles to which the Court said in *Meritor* that courts

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[16] In *Dickson v. Graham-Jones Paper Company*, 84 So.2d 309 (Fla. 1956), on which respondent also relies, the knowledge that the court refused to impart to the employer was knowledge on the part of the very employee whose misconduct – the keeping of a "fighting cock" in the company office – had caused the harm in question. Under agency principles, knowledge on the part of such a perpetrator, e.g., knowledge in this case by Terry

should look for guidance.[17] On the contrary, a "higher management" standard is one that is alien to agency law – as well as, it would appear from the dearth of authority for it in Respondent's Brief, to any area of the law outside of sexual harassment.[18]

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that he was harassing Faragher, is not attributable to his employer if the third party knows the agent's interests are adverse to those of the employer. Restatement (Second) of Agency (1958), sections 271, 280, 496.

[17] The factual context of Gordon's receipt of the complaints is important because it distinguishes the case at bar from the two cases relied upon by respondent concerning ineffective notice to agents. Several women lifeguards, including petitioner and her co-plaintiff, complained about the kind of conduct that personnel director Bender testified Gordon was required to pass up the line (candid admissions that respondent now attempts to rephrase to nothing more than expressions of "aspiration" and "hope." *See* R. Br. at 45, n.37. Gordon did nothing. The district court found this combination of knowledge and inaction on the part of an agent of the City, i.e., Gordon, to provide a basis for imputing to the City knowledge of Chief Terry and Captain Silverman's conduct. Pet. App. at 93a. Neither of the cases relied upon by respondent involve such notice and inaction. Rather, they treat with issues of whether an insurance company would be bound by notice to its corrupt sales agent that an insured had submitted a fraudulent statement of his medical condition, *Mutual Life Insurance Co. v. Hilton Green*, 241 U.S. 613, 623-624 (1916), and whether a notice of cancellation of a fidelity bond was sufficient when the notice was not to the employer who purchased the bond, but rather to the employee whose insurance was being terminated. *Graves v. Iowa Mut. Ins. Co.*, 132 So.2d 393 (Fla. 1961). Both of those cases held the notice to the faithless employees to be inadequate; neither case, however, relates to the circumstances in the case at bar.

[18] Florida negligence law, for example, does not require notice to "higher management" of dangerous conditions. *See, e.g., City of Miami v. Fletcher*, 167 So.2d 638, 639 (Fla. Dist. Ct. App. 1964) (rubbish truck driver's knowledge of prior brake failure "is obviously that of a responsible agent and therefore chargeable to the City").

Additionally, from the standpoint of making the nation's anti-sexual harassment policy user friendly, and thereby effective, it would be unwise to require notice to "higher management" as a condition precedent to maintaining a sexual harassment action: consider the plight of an hourly-wage-level harassment victim who might feel comfortable reporting to her second-level supervisor about how her foreman was behaving, but who would be intimidated at the thought of taking those possibly intimate complaints to relative strangers in the executive suite.[19]

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[19] In drafting the Civil Rights Act of 1991, Congress considered and rejected a proposal that would have required harassment victims to pursue internal complaint procedures. H.R. Rep. No. 102-40(I), pt. 1, at 103 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 641. The same background facts that motivated Congress in 1991 continue to militate against the imposition of any internal notice requirements for sexual harassment liability: " '[E]mployers have not designed adequate complaint mechanisms' " and " '[v]ictims perceive that to come forward within their workplaces is to be labeled as "troublemakers" or "oversensitive." ' " *Id.* (citing testimony of Dr. Freada Klein). Sexual harassers rely on and manipulate their victims' fears about challenging them within the workplaces. A requirement of notice to "higher management" would play into harassers' hands and would lead to a result that Congress sought to avoid: the dismissal of meritorious claims, even claims based on "egregious harassment," because "every technicality" or internal workplace procedure had not been followed.

Finally, there is a major problem with the "higher management" concept, which is: what is "higher management?" No one – neither courts nor victims – knows what "higher management" means. No case law defines it, and respondent offers no test by which courts could determine whether a harassment victim had complained to the proper person.

B. Constructive Knowledge, Based on Pervasiveness

The parties are in agreement that the question of whether harassment is sufficiently severe or pervasive to create a hostile work environment is distinct from, although related to,[20] the question of whether that harassment is so severe and/or pervasive that an employer should have been aware of it. While the en banc majority acknowledged that "there may be other cases in which the same level of pervasiveness can support a finding both of hostile environment and constructive notice," Pet. App. at 16a, n.10,[21] it stated that the district court had

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[20] As Judge Posner noted in *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1422 (7th Cir. 1986), "an employer . . . is unlikely to know or have reason to know of casual, isolated, and infrequent slurs; it is only when they are so egregious, numerous, and concentrated as to add up to a campaign of harassment that the employer will be culpable for failing to discover what is going on and to take remedial steps."

[21] Lower courts have repeatedly recognized that the harassment in a particular case could be so severe and/or pervasive that the employer should have known of the problem. *See, e.g., Smith v. St. Louis University*, 109 F.2d 1261, 1265, n.3 (8th Cir. 1997); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1016 (8th Cir. 1988); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988); *Yates v. Avco Corp.*, 819 F.2d 630, 635-36 (6th Cir. 1987).

"conflated the two inquiries." Pet. App. at 16a. The district court found constructive knowledge arising out of what it properly characterized as the "fairly frequent[]," Pet. App. at 89a, harassment of seven women[22] over a period of five years – harassment so flagrant, for example, that the women felt compelled to shower in protective groups.[23]

The United States suggests that the district court may have confused these two legal standards, and suggests that this issue be remanded to the district court. Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner, at 28-30. Although petitioner does not believe that the district judge applied an incorrect legal standard to her Title VII claim,[24] she agrees that, upon the Court's finding that respondent is liable under Title VII, the case

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[22] In addition to petitioner, the district court identified six other victims of harassment by Terry and Silverman: Nancy Ewanchew, Beverly Barta, Jamie Harrington, Victoria Bonner, Gayle Nye and Janice Chisesi. Pet. App. at 73a-78a.

[23] The en banc majority, disregarding the mandate of Federal Rule of Civil Procedure 52(a) recharacterized the evidence as showing that the harassment only had "occurred intermittently over a long period of time." Pet. App. at 16a. Such ample evidence supported the district court's finding that the district court could not be said to be clearly erroneous.

[24] Where an appellate court believes that the trial court's "findings are infirm because of an erroneous view of the law, a remand [to the trial court] is the proper course unless the record permits only one resolution of the factual issue." *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982).

should be remanded for the consistent application of the same standard to the common law claims.[25]

C. Constructive Notice, Based on the Absence of an Effective Policing Mechanism

As to whether it was negligent for the respondent not to have distributed to its employees, or to have included in the employee handbook, its 1986 sexual harassment policy, respondent argues that a reasonable employer during the 1980s would not necessarily have taken such actions because (1) the EEOC had not yet published its 1990 guidelines and (2) there was in this era so little awareness of sexual harassment as a problem that promulgation and enforcement of policies dealing with it was not recognized as a standard of care. *See* R. Br. at 48-50.

In fact, the EEOC's 1980 guidelines made crystal clear that an employer needed to take aggressive measures to bring its anti-harassment policies to the attention of its employees.[26] In addition, this Court's decision in *Meritor*

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[25] This issue was one of petitioner's original points on appeal. The district court held that the constructive notice test, in a state-law negligence context, "does not contemplate the pervasiveness analysis of Title VII." Pet. App. at 103a. While petitioner raised that in her Petition for Rehearing En Banc, the state-law negligence issues was not one of the issues that the court of appeals instructed counsel to address.

[26] EEOC regulations in effect since 1980 prescribed that:

> An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, . . . informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f) (1986).

clearly put employers on notice of their obligation to address the problem of sexual harassment through not merely articulating, but also implementing, comprehensive policies. 477 U.S. at 72-73. Respondent, however, did virtually nothing – a strategy that enabled respondent to then claim ignorance, even in the face of wide media treatment that brought harassment to the consciousness of virtually anyone who was not trying to ignore it.[27] Respondent now seeks to avoid liability through a lack of vigilance that can only be described as either willful ignorance or gross lack of care.[28]

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[27] A Lexis/Nexis(R) search turned up 557 stories about sexual harassment in *The New York Times* prior to 1990, 32 references in *Fortune*, 24 in *Business Week* and 24 in *Forbes* discussing sexual harassment. *See, e.g.*, Walter Kiechel III & Darienne L. Dennis, "The High Cost of Sexual Harassment," *Fortune*, Sept. 14, 1987, at 147 ("For an employer concerned about preventing problems, the steps to take are fairly obvious. At a minimum, have a well-publicized corporate policy spelling out what constitutes harassment and forbidding such behavior.") The popular movie, "Nine to Five," (IPC Films 1980), had satirized sexual harassment behavior. *The Miami Herald*, the Palm Beach Edition of which circulated in Boca Raton during the relevant years, mentioned sexual harassment in 119 articles during 1989, 67 in 1988, 59 in 1987, 90 in 1986 and 62 in 1985, according to an electronic search of its library.

[28] The Court in *American Soc. of M.E.'s* rejected allowing a principal to "avoid liability by ensuring that it remained ignorant of its agents' conduct," a policy that it said would "encourage [a principal] to do as little as possible to oversee its agents." 456 U.S. at 573.

CONCLUSION

In summary, adoption of the agency and notice interpretations urged by petitioner would energize the Court's command in *Meritor* that lower courts employ traditional agency principles as a means of effecting Congress' policy of preventing sexual harassment. Just as a sound application of agency principles to anti-trust situations prompts businesses to ensure that their agents do not engage in anti-competitive practices, lest the principals suffer damages for even the unauthorized, self-serving acts of their agents, the application of agency principles in Title VII actions would encourage employers to detect and prevent sexual harassment. The interpretations urged by petitioner would result in no-nonsense policies, increased vigilance by employers, and better behavior by supervisory personnel.

For the above reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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